Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH A. CONNOLLY, III,
Petitioner,

v.

Entex Information Services, Inc.,
Respondent.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case arises under the Americans with Disabilities Act ("ADA") and Oregon's statutes prohibiting discrimination against people with disabilities ("Oregon's Statutes"). The case presents the following questions regarding proof of claims under the ADA:

1. In a disability discrimination case brought under the ADA, does a mentally disabled plaintiff create a triable issue of fact defeating summary judgment through evidence that satisfies the test this Court set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)?

2. In a disability discrimination case brought under the ADA, does a mentally disabled plaintiff's proof that his employer failed to engage in an 'interactive process' to arrive at a reasonable accommodation, as required by 29 C.F.R. 1630.1(o)(3), create a triable issue of fact sufficient to defeat a summary judgment motion?

Under Oregon's Statutes, this case presents the following question:

3. Should the Ninth Circuit have followed the precedent of Oregon's Supreme Court to determine whether the evidence submitted was sufficient to withstand summary judgment to the claims brought under Oregon's Statutes?

PARTIES TO THE PROCEEDING

The caption to the case contains the names of all the parties to this proceeding.

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IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH A. CONNOLLY, III, *Petitioner*

v.

ENTEX INFORMATION SERVICES, INC.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joseph A. Connolly, III, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS ENTERED IN THIS CASE

The United States District Court for the District of Oregon entered an Opinion and an Order on May 19, 2000, granting defendant's summary judgment motion against plaintiff's complaint. Copies of that Opinion and Order are included in the Appendix. The Ninth Circuit Court of Appeals entered a Decree of the Court and a Memorandum opinion on December 13, 2001, affirming the District Court. The Memorandum was not reported. Copies of that Decree and Memorandum are included in the Appendix.

The Ninth Circuit also denied plaintiff's Petition for Rehearing En Banc by Order dated January 31, 2002, a copy of which is included in the Appendix.

BASIS FOR JURISDICTION OF SUPREME COURT

The Decree of the Ninth Circuit was entered on December 13, 2001. The Order denying plaintiff's Petition for Rehearing En Banc was entered on January 31, 2002. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254 (1).

RULES AND STATUTES INVOLVED IN CASE

The Americans with Disabilities Act ("ADA") is found at 42 U.S.C. § 12101 et seq. Relevant portions of the ADA are included in the Appendix. Oregon's Statutes prohibiting discrimination against individuals with disabilities are found at O.R.S. 659.400 et seq. Relevant portions of Oregon's Statutes are included in the Appendix.

STATEMENT OF CASE

Facts Relevant to Petition

Petitioner Connolly went to work for Respondent Entex Information Services, Inc. ("Entex") on September 28, 1996 in Entex's Intel Division. Entex hired Connolly subject to a 120-day probationary period which he successfully completed in January of 1997. Before he went to work at Entex, Connolly successfully completed a tour of duty with the United States Navy. He had also succeeded at computer jobs, including receiving a commendation from one employer for his abilities.

Connolly started out in Entex's "WinWin" team, upgrading programs on Intel's computers. All of the positions on the WinWin team were temporary so that Connolly eventually had to transfer to another job at Entex. After completing his probationary period, Connolly requested a transfer to a Desktop Support position, repairing computer problems and assisting Intel users. Connolly was in good standing with Entex at this time, and when he transferred, managers of the Desktop Support program interviewed him, discussed his technical knowledge with him, and determined he was qualified for the new job.

Connolly is a mentally disabled person. His disabilities include Attention Deficit Disorder ("ADD"), Attention Deficit with Hyperactivity Disorder ("ADHD"), depression, and Asperger's Syndrome, a form of autism. When Connolly first went to work at Entex, Connolly filled out an Entex form, indicating that he was a person with a disability. Connolly wanted to alert Entex that he was disabled and might need accommodation. The purpose of that form is so that Entex can consider individuals under its Affirmative Action Program. Connolly was never considered for that program. Despite his disabilities, Connolly had been meeting Entex's expectations until he transferred to Desktop Support. Entex did not discuss with Connolly the fact that he was disabled when he applied for the Desktop Support position nor did Entex discuss with Connolly whether the Desktop Support position was appropriate for someone with his disabilities. If they had, Connolly would have explained the nature of his disabilities. On reflection, Entex management has conceded that they probably would not have hired Connolly if they had known of his disabilities.

In February of 1997, about one month after Connolly

transferred into Desktop Support, the subject of closing a specific number of "tickets" came up for the first time. At that time the subject was presented as a motivational or aspirational goal of twenty tickets per week. In early April Connolly's Campus Manager told Connolly that he was not closing twenty tickets a week – the "expected number". His managers told him his work was good but that he needed to close more tickets. At that time, Connolly told his managers that he was disabled and needed accommodation. They agreed to meet with him weekly to discuss how he was doing. They did not follow through with that agreement.

In that same month Connolly requested a transfer to open positions which did not have a ticket count. His managers refused even to consider a transfer. Instead, Entex chose to deal with Connolly in the disciplinary system. Entex management testified that Connolly could not be considered for a transfer since Entex had identified him as having performance problems.

During the next months until Connolly was terminated, he was considered for only one transfer, back to the WinWin team. There were two problems with the proposed transfer. First, the transfer was to a group different than Connolly had worked with originally and where he had been successful. After he consulted with the supervisor of that group, Connolly determined that the job would not be suitable for his disabilities, and advised Entex management of that decision. The job was not installation or repair of computers. The job was primarily gathering information. Second, all the WinWin jobs were temporary, and, in fact, ended within months of the proposed transfer.

From the time Connolly was put into discipline until he was fired, his performance came under intense scrutiny

in every way. Rather than encouraging the communication process Connolly had requested, Entex began looking for a way to terminate him. Entex management referred how to handle Connolly to human resources with the comment, "We squashed his request for a transfer so far right now." The response was to hold Connolly accountable for the requirements of the job and

> document when he doesn't meet those requirements. Manage up or manage out. Since he has not suggested any specific accommodation, there seems to be nothing we can give consideration to change.

One of Connolly's co-workers was assigned to monitor Connolly's activities surreptitiously, something that had not been done with any other employee.

About the same time, Connolly learned his Manager was being replaced. He asked three times for an opportunity to discuss with the new Manager his disabilities and how they might be accommodated so that he could meet the standard he was told everyone else was meeting. The new Manager did not respond to Connolly's requests. Instead, the first time Connolly met the new Manager was when he was called to the Manager's office on June 24, 1997 and given a Letter of Concern Regarding Your Performance. The Letter documented six asserted problem areas, including the failure to close twenty tickets a week. He was told that if he did not correct the problem areas he would be disciplined "up to and including termination."

Connolly contacted his Human Resources representative and asked for a meeting to see how he could deal with these problem areas, in light of the fact

that his communications with Entex management were becoming very threatening to him. The Human Resources representative forwarded his request to Entex management and responded that he should follow the recommendations in the Letter of Concern. Connolly next sent his managers information about the ADA and ADD. No one discussed the information with Connolly.

On July 21, 1997 Connolly presented an Intensive Task Recovery Plan which set forth an eight-week process to try to achieve the ticket closing requirement. The cornerstones of Connolly's Plan were repetition and weekly meetings with management with positive and negative input. Entex responded on July 25, 1997 with a Final Written Warning and a modified version of the Plan, reducing the time period to four weeks and leaving little room for repetition. In addition to the Plan which Entex proposed, Entex offered Connolly only the following items: a "checklist" and binder to use to take notes and track data; a reduction in the number of tickets given to Connolly at one time from four or five to one or two; and instruction in the use of software to make a report.

The so-called requirement that Connolly close twenty tickets a week became a hard and fast rule that Connolly was never able to achieve. However, what Entex managers did not tell Connolly was that while they were holding him to this inflexible standard, that standard did not apply to other employees, none of whom were disabled. For his part, Connolly did not know how many tickets his co-workers were closing. When that information became available in discovery, it appeared that virtually no technician closed twenty tickets a week throughout the relevant time period. During the calendar year of 1997, there were 274 technicians working at Entex. Only four of those 274 technicians closed an average of

twenty tickets per week for the entire year, and 169 technicians closed fewer tickets than Connolly.

During July and August of 1997, there were eight technicians in Connolly's work group, including Connolly, who were supposedly subject to the twenty ticket requirement. None of those technicians closed an average of twenty tickets per week. One technician closed between eighteen and twenty tickets per week. Every other technician closed fewer than twelve tickets per week. According to Connolly's testimony, none of these technicians was fired. Furthermore, according to documents which Entex produced, there were not even sufficient tickets available for the technicians in Connolly's work group to close twenty per person per week.

At summary judgment, Entex disputed all these facts through affidavits of its management, maintaining that "certain" people were subject to the ticket closing requirement and that other technicians were disciplined for failing to close sufficient tickets. However, Entex was unable to explain who was subject to the "requirement" and who was not. Furthermore, the evidence which Entex provided by affidavit was contrary to deposition testimony that everyone at the job site had production requirements of eighteen to twenty tickets per week. The evidence was also contrary to the deposition testimony of Connolly's lead that Connolly was the only person put on discipline and was the only person management said was not pulling his weight.

As to the qualitative issues which Entex documented, Connolly disputed many of the specifics of alleged missed work or missed meetings. Furthermore, Connolly's management agreed that Connolly received no complaints from customers about his work even though all

other technicians generated complaints from time to time. Furthermore, Connolly presented evidence from his therapist that Connolly's performance during the summer of 1997 did not demonstrate what Connolly was capable of doing because the pressure to which he was being subjected was causing him to sink into depression and into a worsening emotional condition.

The harder Connolly tried to obtain accommodation so that he could meet Entex' "requirements," the more difficult his work environment became. He told his lead he had ADD. His lead's response was that ADD was "bullshit." On another occasion the lead told Connolly to get off his "high horse" or he would slap Connolly. Another employee testified that he considered Connolly lazy even though he acknowledged that laziness is a stereotype used for people with learning disabilities. Connolly's requests to meet were ignored for up to thirty days.

During this entire time, Connolly tried to find a way to propose his own accommodation. His therapist contacted Human Resources to propose accommodations which could have helped Connolly achieve the supposed "requirements" of his job, including performing a work site analysis and working with Connolly as a job coach. After his first conversation with Human Resources, the therapist's calls and letters were ignored.

On August 14, 1997, Entex fired Connolly.

Proceedings Below

Petitioner filed his Complaint, in propria persona, in the United States District Court for the District of Oregon on January 21, 1999, alleging two claims for relief against Entex Information Services, Inc., based on the ADA and on

Oregon's statutes prohibiting discrimination against disabled individuals. Entex filed its Answer and Affirmative Defenses on April 14, 1999, denying the substance of Connolly's claims and asserting a number of affirmative defenses. The only affirmative defenses at issue in this appeal are Entex's assertions that Connolly was not able to perform the essential functions of his position with or without reasonable accommodation, that all of Entex's actions were taken in good faith, and that all of Entex's actions were without malice, ill will or reckless indifference to Connolly.

Entex filed a Motion for Summary Judgment on December 16, 1999. The District Court granted that motion on May 19, 2000. The basis for the District Court's decision was:

> Because Connolly (1) has failed to identify any reasonable accommodation that would have allowed him to perform the essential functions of a Senior Customer Engineer in a Desktop Support position, and (2) opted not to take the reassignment to the WinWin position offered by Entex, he is not a qualified individual with a disability under the ADA or Oregon law and summary judgment is appropriate.

App. at p. 11a.

Connolly appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit on June 14, 2000. The Ninth Circuit entered an unpublished Memorandum and Decree affirming the District Court on December 13, 2001, reasoning:

> Connolly argues that Entex failed to provide reasonable accommodation because it failed to enter the interactive process with him, but Connolly does not show that Entex did not make a good faith effort to provide a reasonable accommodation.
>
> * * * * *
>
> Oregon Revised Statutes § 659.449 provides that Oregon law is to be construed consistently with the federal ADA. Since we have found that Entex did not violate the federal ADA, a similar finding follows as to Connolly's claims under the Oregon statute.

App. at pp. 18a, 19a.

The District Court had subject matter jurisdiction over plaintiff's federal claim pursuant to the ADA, 42 U.S.C. §12117 et seq. and pursuant to 28 U.S.C. §1331 and 42 U.S.C. §1983. The District Court had supplemental jurisdiction over plaintiff's state law claim pursuant to 28 U.S.C. §1367 (a).

DISCUSSION

1. A mentally disabled plaintiff seeking relief for intentional discrimination under the ADA should not be required to meet a more stringent standard of proof to defeat a motion for summary judgment than the standard imposed upon other victims of discrimination under *McDonnell Douglas Corp v Green*, 411 US 792 (1973) and *Reeves v Sanderson Plumbing Products,*

***Inc.*, 530 US 133 (2000).**

The ADA prohibits discrimination against individuals with disabilities as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112 (1).

Congress passed the ADA because Congress determined that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing . . ." 42 U.S.C. § 12101 (a) (1). One central purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101 (b)(2).

A "qualified individual with a disability" is defined as:

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . .

42 U.S.C. § 12111 (8). Reasonable accommodation, in relevant part, is defined as:

> job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

This Court has never determined what are the prima facie elements of a claim under the ADA. However, the statue itself suggests that a claimant under the ADA must offer evidence:

- that the claimant is a qualified individual with a disability;

- that the claimant was able to perform the essential job functions of the claimant's employment, with or without accommodation; and

- that the claimant was discriminated against because of the claimant's disability.

This Court has articulated standards in its case law for proving discrimination claims in the context of race, age and gender, but this Court has not decided whether those standards apply in an ADA claim. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court considered the "order and allocation of proof in a private non-class action challenging employment discrimination" and noted the importance of the Fact Finder's job and the evidentiary problems for a claimant in a discrimination case. In that case, the plaintiff alleged that his employer had discriminated against him on the basis of his race. The

District Court dismissed his discrimination claims, and the Eighth Circuit reversed that decision.

This Court considered how to allocate the burden of proof and how that burden shifts upon a plaintiff's making a prima facie case:

> The complainant in a Title VII trial must carry the initial burden under the statue of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. This Court determined that plaintiff had met his initial burden of proof, and noted, "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Finally, this Court said that the reason proffered by the employer should be examined:

> Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. . . . On remand, respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.

Id. at 804.

This Court examined the shifting burden of proof again in *United States Postal Service v. Aikens*, 460 U.S. 711 (1983), another case involving racial discrimination, and noted the importance of the fact finder's job and the difficulty for a claimant to prove discrimination:

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that the trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.

Id. at 716. *Aikens*, as quoted above, suggests that the analysis set out in *McDonnell Douglas* should apply generally to cases of discrimination. Therefore, the requirements which a claimant under the ADA must meet should be no more or less stringent than those requirements in any other case, given the fact that much must be inferred from circumstantial evidence. This is particularly true since the ADA, unlike race and sex discrimination statutes, imposes an affirmative duty to provide reasonable accommodation to the disabled population, in addition to a duty not to discriminate against the disabled.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court expanded on the *McDonnell Douglas*

reasoning and held:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

Id. at 511 (racial discrimination)(italics in original). In that case, therefore, this Court allowed an inference of a discriminatory mental state from proof that the employer's proffered reason was a pretext.

Finally, in its most recent discussion of the order and allocation of proof in a discrimination case, this Court reaffirmed its decision that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (age discrimination):

> Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Id. at 148. See also, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (gender discrimination). In *Reeves*, this Court also stressed that in reviewing the record, "the court must draw all reasonable inferences in favor of the nonmoving party, and [the court]

may not make credibility determinations or weigh the evidence." *Reeves, supra*, at 150.

As this Court suggested in *Aikens*, the *McDonnell Douglas* allocation of burden of proof should apply to a claim brought under the ADA. However, unlike claimants in race, gender and age discrimination cases, a claimant in an ADA claim also has the right to reasonable accommodation under the ADA. 42 U.S.C. § 12112 (b)(5)(A). Therefore, in the context of summary judgment in an ADA claim, the following principles should apply:

- The claimant should have the burden of raising an issue of fact as to each element of the ADA claim, including raising facts as to whether the employee could have performed the job or another available job with or without reasonable accommodation;

- The burden should then shift to the employer to establish facts supporting a valid, non-discriminatory motive for the adverse employment action;

- The claimant should then have the opportunity to demonstrate that the employer's proffered reason is pretextual; and

- Evidence raising an issue of fact as to whether the employer's reason was pretextual should be sufficient to infer a discriminatory intent on the part of the employer.

In this case, neither the District Court nor the Ninth Circuit ever determined whether plaintiff's evidence was legally sufficient to state a prima facie case of discrimination under *McDonnell Douglas* nor whether plaintiff's evidence created an issue of fact on the issue of pretext. Had either the District Court or the Ninth Circuit applied the *McDonnell Douglas* test, plaintiff's evidence was plainly sufficient both to state a prima facie case of discrimination and to create an issue of fact as to pretext. Plaintiff's evidence was:

- Plaintiff suffers from ADD, depression and Ausberger's Syndrome. Defendant did not dispute that plaintiff's impairments are sufficient to make him a person with a disability under the ADA

- Plaintiff successfully performed the WinWin position, passed probation after 120 days and became a regular employee.

- Plaintiff's therapist gave expert testimony that plaintiff was capable of performing the Desk Top Support position with reasonable accommodation.

- Plaintiff offered both direct and circumstantial evidence of a discriminatory motive through evidence that (1) defendant terminated plaintiff for failing to satisfy a requirement of closing 20 tickets, where defendant did not enforce the same requirement against other similarly situated employees and there was insufficient work for plaintiff to satisfy the claimed requirement; (2) defendant failed to

implement its Affirmative Action Program for disabled persons; (3) defendant's supervisors ignored plaintiff's requests for meetings and failed to follow through with agreed upon meetings with plaintiff; (4) defendant's human resources managers referred to "squashing" plaintiff's request for one form of accommodation and (5) plaintiff's lead worker declared plaintiff's ADD to be "bullshit" and threatened to slap plaintiff around.

Under the *McDonnell Douglas* test, this evidence is plainly sufficient to create an issue of fact as to intentional discrimination. There is no reason that a mentally disabled plaintiff under the ADA should be subject to a more demanding summary judgment standard than other victims of discrimination, particularly in light of the fact that the ADA imposes an affirmative duty to reasonably accommodate the limitations imposed by plaintiff's mental disability. In this case, by ignoring the *McDonnell Douglas* test, both the District Court and the Ninth Circuit improperly assumed the role of a trier of disputed facts.

2. Plaintiff's evidence that defendant failed to initiate the interactive process required by 29 C.F.R 1630.1(o)(3) is sufficient to create a triable issue of fact in a claim brought under the ADA.

This Court has yet to provide guidance to the District and Circuit Courts concerning the ADA's duty to provide "reasonable accommodation." Significant questions exist as to how the parties determine what accommodation is "reasonable," how proof of reasonable accommodation fits into the standards enunciated in *McDonnell Douglas* and its

progeny, and as to whether the "reasonableness" inquiry is a question of law for the court or a question for fact for the jury .

In the instant case, the Ninth Circuit focused on reasonable accommodation in finding that "Connolly does not show that Entex did not make a good faith effort to provide a reasonable accommodation" and that "Entex was not required to give him the reassignment of his choice. . . . Entex satisfied its accommodation obligation by offering the WinWin position to Connolly." App. at p. 19a. Because the Ninth Circuit's decision focuses on the determination of only one issue, disregarding whether Connolly has put forth facts sufficient to establish a prima facie case, that decision is contrary to the standards which this Court has established in *McDonnell Douglas* and its progeny. In addition, the Ninth Circuit never considered how Entex's failure to enter into the interactive process fits into the *McDonnell Douglas* analysis.

Connolly has consistently argued that Entex was required to enter into an interactive process with him and that Entex's failure to do so was evidence of discrimination precluding summary judgment. The source of the interactive process is 29 C.F.R. 1630.1 (o)(3):

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

Although this Court is not bound by regulations promulgated by the Equal Employment Opportunities Commission, this Court has found regulations promulgated under authority from Congress to be deserving of weight. See, e.g., *United States v. Mead*, 533 U.S. 218 (2001) (treasury regulations).

The circuits are split on whether an employer is required to enter into an interactive process with a disabled employee in order to satisfy the employer's burden of providing reasonable accommodation and what the effect is of such a failure. The positions taken by the various circuits fall generally into two categories although in some cases, the decisional law of the circuits is not internally consistent.

Some circuits take the position that the court should focus on determining whether the accommodation which was offered was reasonable. In that analysis, compliance with an interactive process is one fact among many which the court must consider in determining whether the claimant has satisfied the claimant's burden of producing evidence. Such an approach, however, has the effect of substituting the court's factual determination of reasonableness for the ultimate factfinder which is contrary to the direction this Court offered in *Aikens*.

An example of that approach is the First Circuit. That circuit has suggested that the need to engage in the interactive process is decided on a case by case basis. That circuit's position is summed up in *Kvorjak v. State of Maine*, 259 F.3d 48 (1st Cir. 2001). In that case, the First Circuit reviewed how other circuits had approached the "interactive process" and stated:

> Before delving into the substance of

> the accommodation issue, we address appellant's contention that the State violated the ADA by failing to utilize an informal, interactive process to make an individualized assessment of his needs and abilities. . . . Courts have construed the regulation as imposing various levels of obligation. . . . This court has not taken so categorical a stand on the interactive process, preferring instead to resolve the issue on a case-by-case basis.

Id. at 52. Therefore, the First Circuit rejected any notion that failure to enter into the interactive process was itself a violation of the ADA or even necessarily evidence of discrimination.

This same analysis is present in case law from the Eleventh and Seventh Circuits. See, *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (plaintiff must demonstrate a reasonable accommodation regardless of defendant's investigation into potential accommodations); *Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000) (claimant's inability to point to available job as accommodation defeats claim, and defendants' failure to enter into interactive process does not of itself create liability).

However, the Seventh Circuit has been inconsistent in how it has approached reasonable accommodation claims. In *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), the Seventh Circuit held that a case alleging discrimination for failure to provide reasonable accommodation did not even fall under the *McDonnell Douglas* analysis and that the employer's unwillingness to engage in the interactive process

precluded summary judgment in the employer's favor. In contrast to that decision is *Rehling, supra,* which put onto the claimant the burden of proving an available accommodation.

In *Bultemeyer*, also, the Seventh Circuit rejected the notion that the full burden to request reasonable accommodation fell on the employee, particularly where the disability was a psychological disability:

> But properly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say "I want a reasonable accommodation," particularly where the employee has a mental illness.

Id. at 1285.

The notion that an employer's failure to enter into the interactive process may create liability by itself is at the heart of the decisions of a number of circuits. For example, in *Mengine v. Runyon*, 114 F.3d 415 (3rd Cir. 1997), the Third Circuit endorsed the notion that an employer has a duty to enter into the interactive process as part of providing reasonable accommodation. *Id.* at 420-21. In the summary judgment context, the Third Circuit has found that "where there is a genuine dispute about whether the employer acted in good faith [in the interactive process], summary judgment will typically be precluded." *Taylor v. Phoenixville School District*, 174 F.3d 142, 163 (3d Cir. 1999).

The Eighth Circuit sees the employer's failure to enter into the interactive process as evidence that the employer is acting in bad faith:

> We tend to agree with those courts that hold that there is no per se liability under the ADA if an employer fails to engage in an interactive process. . . . [T]he failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith. Under these circumstances, we feel a factual question exists as to whether the employer has attempted to provide reasonable accommodation as required by the ADA.

Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 952 (8th Cir. 1999).

The Ninth Circuit recently appeared to join the Third and Eighth Circuits and even suggested that it would be more deferential to to the interactive process than those circuits:

> employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. We further hold that an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process.

Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1116 (9th Cir. 2000). Ironically, however, in the instant case, the Ninth Circuit focused not on whether plaintiff offered evidence that defendant failed to initiate the interactive process. Rather,

the court focused on whether Connolly identified specific accommodations, whether the court felt the accommodations Connolly identified were 'reasonable'; and, the court determined that offering Connolly a transfer of the employer's choosing was sufficient to avoid liability under the ADA and to allow summary judgment in favor of the employer, regardless of the Ninth Circuit's decision in *Barnett*. Therefore, the Ninth Circuit has also demonstrated inconsistency in its internal decisional law.

Some of the courts which reject liability for failure to enter into the interactive process focus on the language in 29 C.F.R. 1630.1 (o)(3) which states that "it may be necessary" to enter into the interactive process as an indication that the interactive process is permissive rather than mandatory. However, reading the regulation so narrowly undermines the purpose of the ADA to provide "clear, enforceable standards" to address the issue of discrimination against the disabled. Furthermore, treating the interactive process as a suggestion rather than a requirement has the effect of placing an often-times impossible burden on a claimant under the ADA. Since ADA cases invariably arise where the employee has not succeeded and has not received the accommodation which the employee wanted, the employee will be in the position of having to demonstrate that there was an accommodation which would have worked without ever actually having received that accommodation and without going through a process even to identify such an accommodation.

Connolly agrees that there are probably many situations in which what is a reasonable accommodation should be clear or where the employee has made the determination of what is reasonable accommodation and did not desire an interactive process. In those cases, the

employee could not insist on the interactive process. However, in many cases, such as the instant case, where the employee requests the interactive process, requiring the employer to engage in the interactive process will relieve the courts of having to determine whether the accommodations suggested by the employer or the employee are truly "reasonable." Courts will only have to determine whether the parties entered into the interactive process in good faith.

In the context of a summary judgment motion, the imposition of a requirement that the parties engage in the interactive process also conforms with the standards set out in this Court's cases. Since Entex stipulated for the purposes of the summary judgment motion that Connolly was disabled, applying the *McDonnell Douglas* analysis, Connolly had to raise issues of fact as to whether he was a qualified individual capable of performing his job, or another job, with or without accommodation, and whether he was discriminated against by Entex. Connolly satisfied his burden on the first element by presenting evidence that the he successfully performed the WinWin job, passed a probationary period of 120 days and became a regular employee, by presenting expert testimony that he was capable of performing the Desk Top Support position with reasonable accommodation, by presenting accommodations, including potential job transfers for which he was not considered, allowing his therapist to act as a job coach, and by demonstrating that he asked for accommodation including the interactive process and defendant failed to respond. He satisfied his burden as to the second element by producing evidence that Entex's primary asserted reason for firing him – his failure to close sufficient tickets – was a pretext in that the standard was not uniformly applied to other employees. In addition, Connolly produced evidence that Entex's management

refused to enter into the interactive process in order to find an accommodation that would be reasonable and effective. The evidence which Connolly submitted should be sufficient to raise an issue of fact on each prima facie element of his claim and on the issues of whether Entex's reasons were pretext, and on the ultimate question of discrimination.

This Court should grant Connolly's petition in order to address this issue of allocation of burden of proof in an ADA claim and to determine how a claimant's right to reasonable accommodation and the notion of the interactive process affect the claimant's burden of proof.

3. The Ninth Circuit failed to follow the precedent of the Oregon Supreme Court on what is required to withstand summary judgment on a claim under Oregon's Statutes, instead applying federal standards.

The Oregon Supreme Court has determined that a person claiming discrimination in a state claim need only present evidence to raise an issue of fact on the claimant's prima facie case in order to withstand a motion for summary judgment. The Court implicitly rejected the *McDonnell Douglas* analysis in *City of Portland v. Bureau of Labor and Industries*, 298 Or. 104, 690 P.2d 475 (1984), when it considered the possibility of shifting burdens of proof in the employment context. The Bureau had made a factual finding in favor of an employee on a gender discrimination claim. The Supreme Court considered the issue on review. The City took the position that the Bureau's determination could not be upheld because the City had adduced evidence of a non-discriminatory motivation which was uncontroverted. The City also argued that it could overcome the permissible inference of

a discriminatory motive only by establishing an affirmative defense.

The Supreme Court rejected both of those premises and determined that the burden of proof to establish a prima facie case remained on the plaintiff without shifting to the defendant:

> One who merely establishes a prima facie case and rests does not necessarily win even if the opponent adduces no evidence whatsoever and merely relies on a denial of alleged wrongdoing. The trier of fact may, in such instance, decline to draw the permissible inference necessary to establish liability. Indeed, the trier of fact may disbelieve the evidence adduced to establish the fact from which the inferred fact is to be drawn. In either case, the party with the burden of persuasion would lose. On the other hand, were the trier of fact to believe the evidence adduced to prove the primary fact and then draw a permissible inference that establishes the charge, an employer who rests will lose.

Id. at 114-15. The elements of a prima facie case under the Oregon Statutes should be the same as they are under the ADA because Or. Rev. Stat. § 659.449 provides that the Oregon Statutes "shall be construed to the extent possible" with similar provisions of the ADA.

The Ninth Circuit has followed the Oregon Supreme Court's direction on some occasions. See, e.g., *Messick v. Horizon Industries Inc.*, 62 F.3d 1227 (9th Cir. 1995). On other occasions, the Ninth Circuit has not followed that

direction. See, e.g., *Snead v. Metropolitan Property & Casualty Ins. Co.*, 237 F.3d 1080 (9th Cir. 2001).

When faced with a motion for summary judgment, therefore, a claimant would need only to raise an issue of fact as to each element of the prima facie case. There would be no shifting of the burden of proof. Connolly's claims under the Oregon statutes were filed under the federal court's supplemental jurisdiction. Therefore, the court should apply state substantive law and federal procedural law, as it would in a case brought under diversity jurisdiction. Determining what is substantive law is, as this Court has noted, "sometimes a challenging endeavor." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). In that case, this Court set forth the following standards for determining whether a law is substantive or procedural:

> *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), an early interpretation of *Erie*, propounded an "outcome-determination" test: "[D]oes it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" . . . A later pathmarking case, qualifying *Guaranty Trust*, explained that the "outcome-determination" test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by "the twin aims of the *Erie* rule: discouragement of forumshopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Gasperini, 518 U.S. at 427-28.

In this case, the difference is outcome determinative because there is no shifting of the burden of proof. Therefore, Connolly would have prevailed in the motion for summary judgment only by raising an issue of fact as to each element of his claim under the Oregon Statutes.

The District Court and the Ninth Circuit failed to follow the precedent of Oregon's Supreme Court in deciding Entex's summary judgment motion under the Oregon Statutes. This Court should grant Connolly petition to determine whether the federal burden shifting should be applied in federal courts to claims of discrimination against disabled workers under state statutes.

CONCLUSION

This Court should grant Connolly's petition to review these important questions under the ADA and Oregon's Statutes.

Respectfully submitted,

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